# Manoharan a/l Malayalam & Anor v Dato' Seri Mohd Najib bin Tun Hj Abdul Razak & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(NCVC)(W)-308–07 OF 2012
MOHD HISHAMUDIN, ABDUL AZIZ RAHIM AND MOHAMAD ARIFF JJCA
3 JUNE 2013

*Civil Procedure — Striking out — Application to strike out action — Action against Prime Minister and Minister of Education alleging unfair discrimination against Tamil schools — Whether appellants had locus standi — Whether principles on locus standi would apply to present case*

The first appellant an advocate and solicitor and a State Assemblyman, and the second appellant, an advocate and solicitor, had filed a writ action against the Prime Minister of Malaysia ('the first respondent') and the Deputy Prime Minister cum Minister of Education ('the second respondent') alleging that the Federal Government had unfairly discriminated against Tamil Primary Schools (National Type) throughout the country ('the schools'). It was the appellants' case that by denying the schools full financial assistance, the Federal Government had caused the Indian community to be left far behind in terms of education, which in turn had resulted in the high level of poverty among the Indian community in Malaysia. By way of this action the appellants sought, inter alia, a declaration that the practice of providing nominal financial assistance to the Tamil schools was contrary to arts 4, 8 and 12 of the Federal Constitution ('Constitution'); a declaration that the operation of these schools in unsafe and overcrowded conditions was contrary to arts 8 and 12 of the Constitution; and a mandamus seeking to compel the Federal Government to provide full financial assistance to the schools. The respondents' striking out application, pursuant to O 18 r 19 (1)(b) and (d) was granted by the High Court purely on the issue of locus standi. This was the appellants' appeal against that decision.

**Held**, allowing the appeal with costs:
In a situation where there was a bona fide complaint by a concerned citizen that there had been a violation of the Constitution by the government or its agent, such as in the present case, the principles on locus standi would not apply. The case was thus remitted to the High Court for trial on merit (see paras 17 & 26).

**[Bahasa Malaysia summary**

Perayu pertama peguambela dan peguamcara dan Ahli Dewan Undangan Negeri, dan perayu kedua, peguambela dan peguamcara telah memfailkan writ

tindakan terhadap Perdana Menteri Malaysia ('responden pertama') dan Timbalan Perdana Menteri merangkap Menteri Pelajaran ('responden kedua') mendakwa bahawa Kerajaan Persekutuan telah mendiskriminasi dengan tidak adil terhadap Sekolah-Sekolah Rendah Tamil (Jenis Kebangsaan) diseluruh negeri ('sekolah-sekolah tersebut'). Adalah kes perayu bahawa dengan menafikan sekolah-sekolah tersebut dengan bantuan kewangan penuh, Kerajaan Persekutuan telah menyebabkan komuniti orang India jauh tertinggal di belakang dari segi pelajaran, yang sebaliknya telah mengakibatkan tahap tinggi kemiskinan di antara komuniti orang India di Malaysia. Melalui tindakan ini perayu-perayu memohon, antara lain, perisytiharan bahawa amalan memberikan bantuan kewangan yang sangat sedikit kepada sekolah-sekolah Tamil adalah bertentangan perkara 4, 8 dan 12 Perlembagaan Persekutuan ('Perlembagaan'); perisytiharan bahawa sekolah-sekolah ini dalam keadaan tidak selamat dan penuh sesak adalah bertentangan perkara 8 dan 12 Perlembagaan; dan memohon mandamus untuk meminta Kerajaan Persekutuan memberikan bantuan kewangan penuh kepada sekolah-sekolah tersebut. Permohonan pembatalan responden-responden, berikutan A 18 k 19(1)(b) dan (d) dibenarkan oleh Mahkamah Tinggi semata-mata atas isu locus standi. Ini adalah rayuan perayu-perayu terhadap keputusan tersebut.

**Diputuskan**, membenarkan rayuan dengan kos:
Dalam situasi di mana aduan bona fide oleh rakyat yang mengambil berat bahawa terdapat pencabulan Perlembagaan oleh kerajaan atau ejennya, seperti dalam kes ini, prinsip locus standi tidak akan digunapakai. Kes tersebut oleh itu diremit ke Mahkamah Tinggi untuk perbicaraan atas merit (lihat perenggan 17 & 26).]

**Notes**

For cases on application to strike out, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 7992–8012.

**Cases referred to**

*Boyce v Paddington Borough Council* [1903] 1 Ch 109, Ch D (refd)
*Government of Malaysia v Lim Kit Siang United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12, SC (not folld)
*Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64 (refd)
*Rev Christopher v The Attorney-General* Civil Case No 5 of 1993 (folld)
*Rickards v The Medical Benefit Fund of Australia Ltd* (unreported) (refd)
*Robert Linggi v The Government of Malaysia* [2011] 2 MLJ 741, HC (folld)
*Tengku Jaafar bin Tengku Ahmad v Karpal Singh* [1993] 3 MLJ 156, HC (refd)
*Society for the Protection of the unborn children (Ireland) Limited, The v Diarmuid Coogan & Ors, defendants* [1988] IR 734, SC (folld)

**Legislation referred to**

Federal Constitution arts 4, 4(1), 8, 8(1), (2), 12, 12(1), 161E(2)(b)
Rules of the High Court 1980 O 18 r 19(1)(b), (d)
Specific Relief Act 1950

**Appeal from**: Civil Suit No 21(NCVC)-17–02 of 2012 (High Court, Kuala Lumpur)

*M Manoharan (M Manoharan & Co) for the appellants.*
*Effandi Nazila bin Hj Abdullah (Senior Federal Counsel, Attorney General's Chambers) for the respondents.*

**Mohd Hishamudin JCA (delivering judgment of the court):**

**[1]** This appeal is against the decision of the High Court of Kuala Lumpur (Civil Division).

**[2]** On 20 June 2012 the High Court of Kuala Lumpur, pursuant to a striking out application by the respondents (the defendants before the High Court), dismissed the appellants' (the plaintiffs before the High Court) writ action seeking for declarations and certain orders pursuant to the Specific Relief Act 1950 and arts 4, 8 and 12 of the Federal Constitution.

**[3]** The defendants' striking out application (pursuant to O 18 r 19(1)(b) and (d) of the Rules of the High Court 1980) was granted by the High Court purely on the issue of locus standi.

**[4]** We, on 14 January 2013, unanimously, allowed the appeal. We disagree with the learned High Court judge on the issue of locus standi. We take the position that the appellants/plaintiffs have the locus standi.

**[5]** We now give our grounds.

**[6]** The complaints of the plaintiffs are as set out in the statement of claim. We will just summarise them. Essentially, the plaintiffs allege that the Federal Government discriminates against Tamil Primary Schools (National Type) throughout the country (it is alleged that there are 523 of such schools with a pupil population of 120,000), in that the welfare of these schools is being neglected. These schools are not being given full financial assistance like the national schools. Most of the Tamil Primary School buildings are old, and were pre-independence wooden buildings that are termite infested. They are in a dilapidated condition, unsafe for occupation. To add to the problem, there is overcrowding in the classrooms.

**[7]** The declarations and orders that the plaintiffs sought are as set out in the statement of claim. The declarations are as follows:

(a) a declaration that the practice of providing only nominal financial assistance to Tamil Primary Schools (National Type), as opposed to providing full financial assistance, as is the practice in respect of national schools, is contrary to arts 4, 8 and 12 of the Federal Constitution; and

(b) a declaration that the operation of Tamil Primary Schools (National Type) in dilapidated and termite infested pre-independence wooden buildings that are unsafe for occupation; and in overcrowded classrooms of more than 25 pupils per classroom, is contrary to arts 8 and 12 of the Federal Constitution.

**[8]** As to the several orders sought, one of them is a prayer for a mandamus seeking to compel the Federal Government to provide full financial assistance to the 523 Tamil Primary Schools (National Type), in the same manner as the federal government provides to national schools.

**[9]** Article 4(1) of the Federal Constitution provide:

Supreme law of the Federation

4(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void.

**[10]** Article 8 of the Federal Constitution provides:

Equality

8(1) All persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishment or carrying on any trade, business, profession, vocation or employment.

**[11]** Article 12 of the Federal Constitution provides:

Rights in respect of education

12(1) Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth -

(a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees;

(b) in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation).

**[12]** The first and second plaintiffs are advocates and solicitors. The first plaintiff, besides being an advocate and solicitor, is also a state assemblyman. They allege that the federal government unfairly discriminates against Tamil Primary Schools (National Type) throughout the country by denying such schools educational facilities and full financial assistance, causing the Indian community to be left far behind (as compared to other citizens) in terms of education; and this in turn led to high level of poverty among the Indian community in Malaysia.

**[13]** The first defendant is the Prime Minister of Malaysia; whilst the second defendant is the Deputy Prime Minister cum Minister of Education.

**[14]** On the application of the defendants, pursuant to O 18 r 19(1)(b) and (d) of the Rules of the High Court 1980, the High Court dismissed the plaintiffs' writ action on the grounds that the plaintiffs have no locus standi. This is what the learned High Court judge said in his grounds of judgment:

> This court is in the agreement with the submissions of the learned SFC that the plaintiffs have failed to show that they have locus to file this action.
>
> (1) First, upon the question by this court, the first plaintiff has candidly responded that his right has not been affected but he stands for the community as a whole and in particular, the Indian community.
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> (2) Secondly, the first plaintiff has also candidly conceded that there is no 'special injury' caused to him to lodge this complaint as pleaded in the summons but is filed on behalf of the Indian community.
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> (3) Thirdly, this court also finds that the plaintiffs have not pleaded that their interest or rights has been affected but for their community as a whole. They chose to file this action because the first plaintiff is *Wakil Rakyat (ADUN)* and he is here for the interest of the community.

**[15]** The learned High Court judge cited *Government of Malaysia v Lim Kit Siang United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12. In this case, Abdul Hamid Omar CJ (M) (as he then was), said (at p 27):

> This appeal raises an issue of considerable importance. The central issue revolves round the question of 'locus stanch' of a private person seeking a declaration and an injunction in a case for the enforcement of a public right purportedly for public interest.

A 'Locus stand' is generally understood to mean the right of a party to appear and be heard by a tribunal. A litigant is said to have locus standi, in effect standing to sue in a court of law, if that court recognises his or her ability to institute and maintain proceedings before it. The question of standing is thus separate and distinct from questions of the substantive merits and the legal capacity of the plaintiff. It follows, B therefore, that a litigant may lack standing to bring a case which would succeed if brought by the right litigant.

Put in a nutshell, the law of standing to sue has two fundamental rules. First, apart from certain cases in which standing to sue is in the discretion of the court, the plaintiff must possess an interest in the issues raised in the proceedings. Second, C where the private plaintiff relies on an interest in the enforcement of a public right and not of a private right, standing will be denied unless the attorney-general consents to a relator action, or the plaintiff can demonstrate some special interest beyond that possessed by the public generally.

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**[16]** The learned High Court judge also relied on the cases of *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64 and *Tengku Jaafar bin Tengku Ahmad v Karpal Singh* [1993] 3 MLJ 156.

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**[17]** On our part, in the context of the present case, we prefer to adopt the approach as taken by David Wong J (as he then was) in *Robert Linggi v The Government of Malaysia* [2011] 2 MLJ 741 that, in a case where the complaint of the plaintiff is that the federal government or its agent has violated the federal constitution by its action or legislation, he has the locus to bring an F action to declare the action of the federal government or its agent as being unconstitutional, without the necessity of showing that his personal interest or some special interest of his has been adversely affected. The approach that we now take is essential if the constitutional principles that the Constitution is the supreme law of the Federation and that the courts are the protectors of the G Constitution are to have any effective meaning. In other words, what we are ruling is to the effect that in a case where the complaint of the plaintiff is that there has been a violation of the Constitution by the federal government or its agency, the *Lim Kit Siang* principles on locus standi do not apply.

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**[18]** In *Robert Linggi* the plaintiff was a Sabahan. He complained of a breach by the federal government of the constitutional provisions entrenched in art 161E(2)(b) of the Federal Constitution. This article provides:

I (2) No amendment shall be made to the Constitution without the concurrence of the Yang di-Pertua Negeri of the State of Sabah and Sarawak or each of the States of Sabah and Sarawak concerned, if the amendment is such as to affect the operation of the Constitution as regards any of the following matters:

> (b) the constitution and jurisdiction of the High Court in Sabah and Sarawak and the appointment, removal and suspension of judges of that court; …

**[19]** He sought, among others, for a declaration that that the removal of the power of appointment of judicial commissioners to the High Court of Sabah and Sarawak by the respective Yang di-Pertua Negeri and the setting up of the Judicial Appointment Commission under the Judicial Appointment Commission Act 2009 were unconstitutional and thus null and void.

**[20]** Before David Wong J, learned senior federal counsel, for the Government of Malaysia (the defendant), raised the issue of the locus of the plaintiff, citing the judgment of Buckley J in *Boyce v Paddington Borough Council* [1903] 1 Ch 109, and the judgment of Bowen CJ in *Rickards v The Medical Benefit Fund of Australia Ltd* (unreported, 18 April 1975, referred to in *Declaratory Orders* (2nd Ed), PW Young QC). David Wong J, however, rejected the argument of learned senior federal counsel. The learned judge of the High Court of Kota Kinabalu ruled (at p 749):

> [6] With respect to counsel for the defendant, to adopt her contention would be taking a retro step in the law on 'locus standi' in public law especially when there is a challenge to legislations made in contravention to the Federal Constitution. The Federal Constitution is the supreme law of the country and was drafted by the founding fathers of the country after taking into consideration the interests of all relevant parties prior to the formation of Malaysia. It is a document which belongs to all Malaysians irrespective of their race and standing in society and starting from that base, it must logically follow that all Malaysians had an entrenched right to litigate their grievance in court when there was a perceived breach of the Constitution by the legislature.

**[21]** And, at a later part of his judgment, the learned judge said (at p 751):

> [11] The plaintiff, as a Sabahan, in my view is genuinely concerned with the erosion of the rights of Sabah in so far as 'the constitution and jurisdiction of the High Court in Sabah and Sarawak and the appointment, removal and suspension of judges of that court' and since it concerns an attempt to uphold the Federal Constitution, I have no hesitation in finding that the plaintiff has the 'locus standi' to bring this action. I am fully aware of the argument that this may encourage litigation but in my view when there is a challenge concerning any dismantling of the supreme law of the country, litigation should be encouraged. In any event, all Malaysians have a duty to protect our Constitution.

**[22]** David Wong J found support in his judgment in the Tanzania High Court case of *Rev Christopher Mtikila v The Attorney-General* Civil Case No 5 of 1993 where it was held:

> The notion of personal interest, personal injury or sufficient interest over and above the interest of the general public has more to do with private law as distinct from public law. In matters of public interest litigation this court will not deny standing to a genuine and bona fide litigant even where he has no personal interest in the matter … Given all these and other circumstances, if there should spring up a public-spirited individual and seek the courts intervention against legislation or actions that prevent the Constitution, the court's, as guardian and trustee of the government and what it stands for, is under an obligation to rise up to the occasion and grant him standing. The present petitioner is such an individual.

**[23]** Another case relied upon by David Wong J is the judgment of the Supreme Court of Ireland in *The Society for the Protection of the unborn children (Ireland) Limited v Diarmuid Coogan & Ors, defendants* [1988] IR 734. Here, in this case, the Supreme Court of Ireland held:

> Every member of the public has an interest in seeing that the fundamental law of the state is not defeated, and although the courts are the ultimate guardian of the Constitution, such protection is possible only where their powers are invoked. Since breaches of constitutional rights may on occasion be threatened by the government itself or its agents, it would be intolerable if access to the courts to defend and vindicate such constitutional rights were confined to the attorney general as the very officer of state instructed to defend the government's position.

**[24]** With respect, we wholeheartedly adopt the above passages as quoted by David Wong J in the Tanzanian case of *Rev Christopher Mtikila* and in the Irish case of *The Society for the Protection of unborn children*. Lest we be misunderstood, we wish to stress here that the principle that we are enunciating in this judgment on the issue of locus standi concerned purely a situation where there is a bona fide complaint by a concerned citizen of a violation of the Constitution by the government or its agent.

**[25]** We conclude our judgment by referring to and approving the following passage in the dissenting judgment of Abdoolcader SCJ, in *Lim Kit Siang* (at p 45):

> The effect of the denial of standing in such circumstances would be, and it has indeed be so suggested, that we will have to fold our arms and do nothing, in which event I would add we might also as well have to hang our heads in sorrow and perhaps even in mortification in not being able to at least entertain for consideration on its merits any legitimate complaint of a public grievance or alleged unconstitutional conduct. To take an instance: If a considerable sum of money is taken out by executive fiat from the consolidated fund without Parliamentary approval by way of a Supply Act for the implementation of a project, however laudable, the legality of such a move would then be incapable of being tested or challenged by a public-spirited citizen or a tax payer as in *Ex parte Smedley and Finlay v Canada*. The courts must therefore be cautious in accepting any postulate that

purports to narrow the rights of recourse to them and, in the present context, in constricting the concept of standing in public law in litigation, and will have to be ready to sharpen their constitutional knives as and when the occasion demands.

**[26]** Appeal allowed with costs; matter remitted to High Court for trial on merit.

*Appeal allowed with costs.*

Reported by Kohila Nesan